In the High Court of Uttaranchal at Nainital.

Criminal Jail Appeal No. 110/2002

Dev Bahadur Magar son of Khathu Magar,
R/o village Sewali Baang, P.S. Khalaga,
District Pawethan, Anchal Rapti, Nepal……Appellant.

Vs.

State ……..Respondent.

Sri A.S. Gill, learned counsel for the appellant.
Sri A. Rub, learned Additional Government Advocate for the respondent.
Date of Judgment: 19-05-2004.

ORAL JUDGMENT **(Per: Hon'ble Irshad Hussain, J.)**

This criminal appeal is directed against the judgment and order dated 6.4.2002 passed by Sessions Judge, Champawat in sessions trial no. 57/2001, whereby the appellant was convicted and sentenced to undergo Rigorous Imprisonment for ten years and to pay a fine of Rs. 1,00,000/-(one lac) and in default of payment of fine to further undergo R.I. for two years under section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'Act').

2- The appellant was charged for the offence in view of his being found in illegal possession of 840 grams of 'Charas' at about 6.30 p.m. on 20-5-2001 near border post of Banbasa-Sharda Bairaj within the circle of P.S. Banbasa district, Champawat. The appellant was on account of his suspicious movement was asked by the constables Ram Babu and Kanhaya Bhagat to stop but he started running away from there. He was chased and was apprehended and he was asked to disclose his identity. He told his name as Dev Bahadur resident of Nepal and he further told that he is carrying illegal 'Charas' and on account of this he wanted to run away from there. He was informed of his right to be searched in the presence of a Gazetted Police Officer or a Magistrate but he refused and asked for his search to be made by these police constables. On search being made contraband 'Charas'

was recovered from his possession and on weighment the contraband item was found to be 840 grams. The search and arrest memo (Ext. Ka. 2) was then prepared and copy of the same was given to the appellant. The contraband seized was sealed at the spot and the appellant was brought to the police station where F.I.R. (Ext.Ka.5) was lodged at 8.30 p.m. The sample of the contraband weighing about 20 grams taken on the spot and properly packed and sealed was sent for chemical examination. The Chemical Examiner vide his report Ext.Ka.7 confirmed that the sample of the contraband seized was 'Charas'. After investigation charge sheet (Ext.Ka.4) was submitted against the appellant on 20-8-2001.

3- Appellant did not admit the accusation of the prosecution and claimed that he had been falsely implicated in the case by the police. He stated that he intended to go to Punjab to work there as a labourer.

4- In the trail the prosecution examined 4 witnesses, out of which P.W.1, constable Kanhaya Bhagat and P.W.3, S.I. Govind Prakash have arrested the appellant and on search being made the contraband 'Charas' was recovered from the possession of the appellant. They fully supported the prosecution case as disclosed above. P.W.2, S.O. C.S. Yadav has investigated the crime and he proved the steps taken in that regard and the charge sheet filed against the appellant. P.W.4, constable Ganga Singh formally proved the check F.I.R. and copy of the G.D. report of the registration of the case (Ext.Ka.6). In defence appellant Dev Bahadur examined himself as D.W.1. He stated that he intended to go to Ludhiyana to work as a labourer but was arrested by the police near Banbasa-Sharda Bairaj and that no contraband 'Charas' was recovered from his possession. In cross examination he stated that the police has no enmity with him. He denied to suggestion that the contraband 'Charas' weighing 840 grams was recovered from his possession. The learned Sessions Judge made an appreciation of the evidence on record and found the evidence of the prosecution reliable and credit-worthy to prove the charge leveled against the appellant and the appellant was accordingly convicted and sentenced as mentioned above.

5- The learned counsel for the appellant submitted that there was no compliance of the provision of section 50 of the 'Act' in as much

as the appellant was not informed of his right to be searched before a Magistrate or a Gazetted Officer and to bring his point of view the learned counsel pointed out to the memo of recovery and arrest Ex.Ka.2. In it, it is mentioned that the appellant was given option to be searched before a Magistrate or a Gazetted Police Officer. Learned counsel submitted that the appellant should have been given option to be searched before the Gazetted Officer or the Magistrate and not before a Gazetted Police Officer and therefore there was no compliance of the above provision of the 'Act'. The relevant sub-section (1) of section 50 of the 'Act' reads as below:-

> **"50 Conditions under which search of persons shall be conducted-**(1) When any officer duly authorized under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate."

6- A bare reading of the above provision shows that the search of the person is required to be made before the nearby Gazetted Officer of any of the department mentioned in section 42 or before the nearest Magistrate after such a person want to be searched accordingly on being informed of his said legal right. Department of police find mention in section 42 and if in memo of arrest and recovery Ext.Ka.2 it was mentioned that the appellant was given option to be searched before a Magistrate or a Gazetted Police Officer it would not mean that there was no compliance of the provision of section 50 of the 'Act'. In the case **Joseph Fernandez vs. State of Goa; (2000)1 Supreme Court Cases 707** the Apex Court has laid stress that there should be substantial compliance of the said provision and in the instant case the appellant was informed that if he wish he may be searched in the presence of a Magistrate or a Gazetted Police Officer and as such there can not be any doubt that substantial compliance of the provision stand established. Prosecution witnesses P.W.1 and

P.W.3 also reiterated the same thing and there is nothing in their cross examination which may indicate any substantial infraction in

compliance of the mandatory provision. On the face of the facts of the case the reported decision in the matter of **Sewak Singh vs. State of Punjab; 1999 J.Cr.C. 256 (P & H) 256** pressed in to service by the learned counsel for the appellant has no relevance because in the reported case the suspect was told that he may be searched before the Deputy S.P. who was already in the police party which apprehended the suspect.

7- It was next argued by the learned counsel that the evidence of the prosecution lack sanctity in regard to the weight of the contraband said to have been seized from the appellant. Weighment of the recovered contraband was made at the spot itself and according to P.W.1 weights possessed by the police party were of 200, 500 and 100 grams and pointing out to this the learned counsel submitted that with these weights it was not possible to correctly weigh the 840 grams of the contraband. The witness was not cross-examined as to how with the help of 3 weights mentioned above the contraband seized was weighed as 840 grams and it appear that the same being a little in excess of the said weights of 800 grams the quantity was described as 840 grams. At any rate it was not less than 800 grams and it is also of significance that the defence did not move any application during the trial to have the contraband seized weighed in the court. Therefore the evidence of the prosecution can not be said to be discrepant and untrustworthy on the basis that the arresting party was carrying the weights of 200, 500, 100 grams only at that time. There is in fact nothing suspicious in the prosecution version and anything inherently improbable in the evidence which may indicate that the prosecution story was not true and its evidence was not reliable. In my view the appellant was rightly held guilty and convicted.

8- Learned counsel for the appellant next argued that the sentence awarded is excessive in view of the fact that the quantity of the contraband seized was not commercial and further that the appellant has no criminal history. Learned counsel also submitted that the appellant is a young man of less than 30 years and he should have

been given lesser sentence as provided under section 20 of the ‘Act’. The notification specifying ‘small quantity’ and ‘commercial

quantity’ of the contraband as issued in exercise of the powers conferred by the relevant provisions of the ‘Act’, the ‘Charas’ find place at serial no.23 and ‘small quantity’ of the same is 100 grams whereas the ‘commercial quantity’ is 1 kg. or more. The appellant was found in possession of 840 grams of ‘Charas’ which was lesser than the ‘commercial quantity’ but greater than ‘small quantity’ and the punishment provided for possession of this much quantity in contravention of the provisions of the ‘Act’ is rigorous imprisonment for a term which may extend to 10 years and fine which may extend to 1,00,000/- rupees as prescribed by section 20(b)(ii)(B) of the ‘Act’. The appellant was arrested on 20-5-2001 and he is under detention since then. Learned counsel stated that considering the attending circumstances the sentence of 3 years now already undergone by the appellant together with suitable fine may be sufficient to meet the ends of justice. Having considered the submission of the learned counsel in the light of the factors pointed out above regarding no criminal history, age and quantity of the contraband seized, I am of the view that the sentence of imprisonment already undergone and a fine of Rs. 15000/- shall be sufficient in the interest of justice and the sentence awarded by the learned Sessions Judge need to be modified and reduced accordingly.

9- For the reasons aforesaid the appeal succeeds partly and is to be disposed of accordingly.

10- The appeal is partly allowed. The conviction of the appellant as recorded by the learned Sessions Judge per judgment and order dated 6.4.2002 is confirmed. The sentence awarded is however modified and reduced to the sentence of imprisonment already undergone and to pay a fine of Rs. 15,000/- (fifteen thousand) only. In default of payment of fine the appellant shall further undergo R.I. for 6 (six) months.

11- Let the record be sent back to the court concerned and the compliance report be submitted within one month.

(Irshad Hussain, J.)

ISB